May 13, 2005

Sen. Frist On Giving Judicial Nominees Vote

"But when you have a nominee that comes over, all you can do is shine the light, you examine him, unlimited debate ... And then to give advice and consent--which is in that Constitution--how do you do it? Vote yes, no. Confirm, reject."

(Jesse J. Holland, "Senate's Dean Warns Frist About Legacy He'll Leave Over Judicial Filibusters," The Associated Press, 5/12/05)

Sen. Jeff Sessions (R-AL) On William Pryor

"He has political views, but his overriding view is that the law is pre-eminent and should be enforced. ... We can't look at someone's personal faith or religious faith and say, 'I don't agree with you on this, I don't agree with you on that personally, therefore you can never be a judge ... The test must be and always must be, do they respect the law?'"

(Michael A. Fletcher, "Pryor Nomination Moves to Full Senate," The Washington Post, 5/12/05; Jeffrey McMurray, "Judiciary Committee Approves Pryor Nomination, Sends To Senate Floor," The Associated Press, 5/12/05)

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Nuclear? No, Restoration
Washington Post
By Charles Krauthammer
Friday, May 13, 2005

Four years ago this week, President Bush nominated Texas Supreme Court Justice Priscilla Owen to the federal bench. Four years later, she and six other appeals court nominees remain unconfirmed and unvoted upon because of Democratic filibusters.

This technique is defended by Democrats as traditional and rooted in history. What a fraud. The only example that comes close is Lyndon Johnson's nomination in 1968 of (sitting) Supreme Court Justice Abe Fortas to be chief justice. But this case is muddied by the fact that (a) Fortas was subject to allegations involving conflictsof interest and financial impropriety, (b) he did not appear to have the votes anyway, and (c) the case involved elevation on the court, not appointment to the court.

Even if we concede Fortas, that is one successful filibuster, 37 years ago, in two centuries of American history. In 2000, a small number of Republicans tried to filibuster two Clinton judicial nominees but were defeated in that attempt not only by Democrats but also by Republicans voting roughly 3 to 1 for cloture.

There has certainly never been a successful filibuster in the case of a judicial nominee who clearly had the approval of a majority of the Senate. And there has surely never been a campaign like the one undertaken by the Democrats since 2001 to systematically deny judicial appointment by means of the filibuster.

Two hundred years of tradition has been radically and unilaterally changed by the minority. Why? The reason is obvious. Democrats have not had a very good run recently in the popularly elected branches. Since choosing the wrong side of the culture wars of the 1960s, they have won only three of the past 10 presidential elections. A decade ago they lost control of the House for the first time in 40 years, and now have lost all the elected branches. They are in a panic that they will lose their one remaining ability to legislate -- through the courts.

And this they have done with great success, legislating by judicial fiat everything from abortion to gay marriage to religion in the public square. They want to maintain that commanding height of the culture and are not about to let something like presidential prerogative and two centuries of Senate history stand in their way.

Hence the filibuster strategy. Feeling they have a weak hand, however, they have been offering deals. In the latest, as reported in Roll Call, Democrats would allow some appellate court nominees to go through, deny at least three others, and promise not to filibuster a Supreme Court nominee as long as there are no "extreme circumstances."

But of course Democrats believe that anybody who, say, opposes affirmative action on principle is extreme. As is anyone who believes (as, for example, I and many others do) that abortion should remain legal but that Roe v. Wade is a travesty -- an extreme case of judicial arrogance and constitutional invention -- worthy of repeal.

If Republicans accept this kind of deal, they are fools. They have a perfectly constitutional, perfectly reasonable case for demanding an up-or-down vote on judicial nominees, and they should not be throwing it away for a mess of potage and fuzzy promises.

Senate Majority Leader Bill Frist seems intent on passing a procedural ruling to prevent judicial filibusters. Democrats have won the semantic war by getting this branded "the nuclear option," a colorful and deliberately inflammatory term (although Republican Trent Lott, ever helpful, appears to have originated the term). The semantic device reminds me of the slogan of the nuclear freeze campaign of the early 1980s: "Because nobody wants a nuclear war." (Except Ronald Reagan, of course.)

Democrats are calling Frist's maneuver an assault on the very essence of the Senate, a body distinguished by its insistence on tradition, custom and unwritten rules.

This claim is a comical inversion of the facts. One of the great traditions, customs and unwritten rules of the Senate is that you do not filibuster judicial nominees. You certainly do not filibuster judicial nominees who would otherwise win an up-or-down vote. And you surely do not filibuster judicial nominees in a systematic campaign to deny a president and a majority of the Senate their choice of judges. That is historically unprecedented.

The Democrats have unilaterally shattered one of the longest-running traditions in parliamentary history worldwide. They are not to be rewarded with a deal. They must either stop or be stopped by a simple change of Senate procedure that would do nothing more than take a 200-year-old unwritten rule and make it written.

What the Democrats have done is radical. What Frist is proposing is a restoration.

Editorial: Going Nuclear
THE WALL STREET JOURNAL
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Barring a surprise last-minute deal, U.S. Senate Majority Leader Bill Frist will soon ask for a ruling from the chair -- Vice President Dick Cheney presiding -- that ending debate on a judicial nominee requires a vote of a simple majority of 51 senators, not a super-majority of 60. The so-called nuclear option -- aka the "constitutional option" -- will have been detonated. Judicial filibusters, R.I.P.

This will not be the world's greatest deliberative body's greatest moment, and the only thing we know for sure about what will happen next is that the reputation of the U.S. Senate will suffer. It's a shame that it's come to this. But at this point it would be worse if Republicans let a willful minority deny the president's nominees a vote on the Senate floor.

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On the eve of this brawl, it's worth recalling how we got here. Our own choice for what started the modern bitterness would be 1987 and the Robert Bork nomination to the U.S. Supreme Court. There were previous nomination battles but the trashing of such a widely respected jurist marked that date that nominations became political campaigns.

The judicial filibuster of the last two years marks another political escalation -- this time twisting a procedure used historically for the most important legislative debates into an abuse of the Senate's advise-and-consent responsibility. Had their nominations been allowed to go to the floor, every one of the 10 men and women filibustered in the last two years would have won majority support, including Democratic votes.

The audacity of the Democrats' radicalism is illustrated by the breadth of their claims against the nominees. It isn't just one nominee they object to; it's 10 and counting. It isn't just abortion they're worried about but the entire range of constitutional law.

This also marks a political escalation in reaching below the U.S. Supreme Court to the federal circuit courts of appeal. These nominations have long been considered more or less routine. With the filibuster, Democrats are denying an elected president the ability to fill out even the lower courts.

They are going to such bitter lengths, we suspect, precisely because they view the courts as their last hold on federal power. As liberals lost their majority status over the past 30 years, they turned increasingly to the courts to implement their political program. The Bush nominees, pledged to judicial restraint and greater deference to legislatures, will mean the left has to return to the electoral arena to get its way.

In our view, this is among the best reasons to defeat the judicial filibuster. If Democrats succeed in blocking these nominees, they will feel vindicated in their view that judicial activism pays. They will also conclude that Senate obstructionism works, and so will dig in for more of it.

We understand the argument of conservatives who worry about undermining a process that protects minority rights. But the filibuster is a Senate rule that has been changed frequently over the years, while the right of a president to nominate judges is written into the U.S. Constitution. Only one judicial nominee -- Abe Fortas for chief justice of the Supreme Court -- has ever arguably been filibustered and that was for the purpose of taking a straw vote on his prospects, not to deny him an up-or-down vote on the Senate

floor. Democrats who point to other judicial "filibusters" are deliberately confusing the distinction between a filibuster and a vote for cloture, or to end debate.

As for Republicans who want to preserve the option of filibustering a future nominee, it'd be just as wrong for them to do so. In any event, Democrats willing to use the filibuster to block judges would have any qualms about using the nuclear option themselves to kill a filibuster in the future.

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This is at its core a political fight, and elections ought to mean something. Republicans have gained Senate seats in two consecutive elections in which judicial nominations were among the most important issues, including against the Senate Minority Leader.

Perhaps the coming showdown and the media circus that will accompany it will lead to more political bitterness, but it's also possible it could work the other way. If Democrats conclude they can't succeed by abusing procedures, then they will begin to realize the limits of legislating through the courts. Maybe they'll even return to trying to win power the old-fashioned way, through elections.

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